Low Pak Houng v Tan Kok Keong

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3-24-558 OF 1994
ABDUL AZIZ J
21 NOVEMBER 1997

Family Law *— Children — Guardianship — Illegitimate children — Whether the father of an illegitimate child could claim guardianship of that child — Whether the Guardianship of Infants Act 1961 is applicable to illegitimate children — Guardianship of Infants Act 1961 s 5*

The applicant — the mother of an illegitimate child — applied for guardianship of the child. The father contested the application. The merits of the father or mother as a guardian was not at issue. The court was to ascertain whether: (i) s 5 of the Guardianship of Infants Act 1961 ('the Act') is applicable to the father of an illegitimate child in order to allow him to claim guardianship of that child; and (ii) the Act as a whole is applicable to illegitimate children so as to enable the mother to rely on it to claim guardianship of the child.

Held, allowing the application:

Section 5 of the Act is intended to apply to a lawful father and accordingly the father of an illegitimate child cannot claim guardianship under it.

The wider question was whether the Act as a whole applies only to legitimate children and does not apply to illegitimate children. However, in this case, if s 6 of the Act does not apply to illegitimate children, so that the mother in this case cannot rely on it to claim guardianship of the child, then the question must be decided according to the common law of England, under which the mother, to the exclusion of the father, has rights over and obligations towards her illegitimate child. For that reason, the mother was ordered to be the guardian of the child (see p 327D–H).

Obiter:

Even though it was held in *Re Balasingam* that the High Court has no jurisdiction to entertain custody proceedings — and this includes guardianship proceedings — which cannot be brought under the Act, it does not seem right that the jurisdiction should be restricted to cases that can fall within the Act. Furthermore, s 24(d) of the Courts of Judicature Act 1964 gives the High Court 'jurisdiction to appoint and control guardians of infants and generally over the person and property of infants'. In any event, the question of jurisdiction had not been raised or argued in this case and the court had already made an order granting custody of the child to the mother, which order was applied for and granted by virtue of the proviso to s 5. No objection to jurisdiction having been raised, the court shall act on the assumption that it had the jurisdiction (see p 329B–D).

A [**Bahasa Malaysia summary**

Pemohon — ibu seorang anak tak sah taraf — telah memohon untuk penjagaan si anak. Si bapa telah menentang permohonan. Merit si bapa atau si ibu sebagai penjaga tidak menjadi isu. Mahkamah hendaklah menentukan sama ada: (i) s 5 Akta Penjagaan Budak
B 1961 ('Akta tersebut') adalah terpakai kepada bapa seorang anak tak sah taraf bagi membolehkannya menuntut penjagaan anak tersebut; dan (ii) Akta tersebut pada keseluruhannya adalah terpakai kepada anak tak sah taraf supaya membolehkan si ibu bergantung padanya untuk menuntut penjagaan si anak.

C **Diputuskan**, membenarkan permohonan:

Seksyen 5 Akta tersebut bertujuan terpakai kepada bapa yang sah dan oleh itu bapa seorang anak tak sah taraf tidak boleh menuntut penjagaan di bawahnya.

Soal yang lebih luas adalah sama ada Akta tersebut terpakai
D hanya kepada anak sah dan tidak terpakai kepada anak tak sah taraf. Walau bagaimanapun, dalam kes ini, sekiranya s 6 Akta tersebut tidak terpakai kepada anak tak sah taraf, supaya si ibu dalam kes ini tidak boleh bergantung padanya bagi menuntut penjagaan si anak, maka soal mestilah diputuskan menurut common law England, di
E bawah mana si ibu, mengetepikan si bapa, mempunyai hak ke atas dan obligasi terhadap anak tak sah tarafnya. Untuk sebab itu, si ibu diperintahkan menjadi penjaga si anak (lihat ms 327D–H).

Obiter:

F Biarpun ia diputuskan dalam *Re Balasingam* bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk melayan prosiding jagaan — dan ini termasuk prosiding penjagaan — yang tidak boleh dibawa di bawah Akta tersebut, ia seolah tidak betul bahawa bidang kuasa harus dihadkan kepada kes yang boleh dirangkumi oleh Akta tersebut. Tambahan pula, s 24(d) Akta Mahkamah Kehakiman 1964
G memberikan Mahkamah Tinggi 'bidang kuasa untuk melantik dan mengawal penjaga budak-budak dan pada umumnya ke atas orang dan harta budak-budak'. Walau bagaimanpun, persoalan bidang kausa tidak ditimbulkan atau dihujahkan dalam kes ini dan mahkamah telah pun membuat perintah membenarkan jagaan si anak kepada si ibu, yang mana perintah telah dipohon dan dibenarkan disebabkan
H proviso s 5. Memandangkan tiada bantahan terhadap bidang kuasa telah dibangkitkan, mahkamah akan bertindak atas anggapan bahawa ia mempunyai bidang kuasa (lihat ms 329B–D).]

Notes

I For cases on guardianship of children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1833–1840.

Cases referred to

Balasingam & Paravathy, Infants: Kannamah v Palani, Re [1970] 2 MLJ 74 (refd)

CT (an infant), Re [1957] Ch 48 (refd)
Low Pek Nai v Koh Chye Guan [1995] 1 MLJ 238 (refd)
M (an infant), Re [1955] 2 QB 479 (refd)
Miskin Rowter, Re [1963] MLJ 341 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 24(d)
Guardianship of Infants Act 1961 ss 5, 6
Guardianship of Infants Ordinance of the Straits Settlements (SS Cap 50)
Law Reform (Marriage and Divorce) Act 1976
Legitimacy Ordinance of the Straits Settlements (SS Cap 85) s 10
Legitimacy Ordinance of the Federated Malay States (FMS Cap 69) s 10
Legitimacy Act 1961 s 11
Guardianship of Infants Acts 1886 and 1925 [UK]

Leonard Foo (*Leonard Foo & Associates*) for the applicant.
Ng Chek (*Ng Chek & Co*) for the respondent.

Cur Adv Vult

Abdul Aziz J: I have already, on the application of the mother in this case, made orders in her favour for the custody, care and control of and maintenance for the child, who is an illegitimate child. I have deferred decision on her application for guardianship of the child and on costs. I did so in order to satisfy myself whether s 5 of the Guardianship of Infants Act 1961 applies in the case of an illegitimate infant. Section 5 of the revised Act says:

> Subject to section 10, the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

In this case, the question of guardianship is one only between the father and the mother. No other party is involved. Guardianship goes either to the father or the mother. Further, what has arisen is only a question of law, not of the merits of the father or mother as a guardian. So if s 5 applies to an illegitimate child, the father shall be the guardian.

There is the judgment of Raja Azlan Shah J in *Re Balasingam & Paravathy, Infants: Kannamah v Palani* [1970] 2 MLJ 74. It was a mother's application — presumably made under the proviso to s 5 of the 1961 Act — for the custody of her two children, whom the learned judge assumed to be illegitimate children. It was held that the Act — the whole Act — did not apply to illegitimate children and so the court had no jurisdiction to entertain the application.

A The revised 1961 Act was originally enacted by Parliament as Act No 13 of 1961. It adopted — in form, substance and arrangement of provisions, with minor changes — the Guardianship of Infants Ordinance of the Straits Settlements (SS Cap 50), which it repealed. The Ordinance had been in force since 1 January 1935.

B At the time when the 1935 Ordinance came into existence, the statute law in England about guardianship of infants was contained in the Guardianship of Infants Acts 1886 and 1925. The 1935 Ordinance did not bear any resemblance to the English Acts although certain aspects of guardianship dealt with in the English Acts were dealt with in the Ordinance. As in the English Acts, the terms 'father', 'mother', 'infant' and 'parents' C were used in the Ordinance. There was no provision in the English Acts — as there was in s 5 of the Ordinance and there is now in s 5 of the 1961 Act — about the position of the father as a guardian. It is highly probable, however, that the legislators of the 1935 Ordinance did consider the English law on guardianship as was to be found in judicial decisions and D in the English Acts and set about to draft for the Straits Settlements a simple and self-contained law to suit local needs and circumstances.

The law of England at that time is reflected in the following dictum of Denning LJ in *Re M (an infant)* [1955] 2 QB 479 (at p 488):

> In my opinion the word 'parent' in an Act of Parliament does not include E the father of an illegitimate child unless the context otherwise requires. This is implied in the decision in *Butler v Gregory* [(1902) 18 TLR 370] with which I agree. The reason is that the law of England has from time immemorial looked on a bastard as the child of nobody, that is to say, as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him F pay for the child's maintenance if it can find out who he is. The law recognizes no rights in him in regard to the child: whereas the mother has several rights.

Moved by the use in that passage of the word 'bastard' — which means an illegitimate child but which some people might regard as bearing odious G connotations — I have to say in passing that the child in this case is not the fruit of sexual misconduct but of a communally-sanctioned Chinese customary marriage which unfortunately for the child is not recognized by the Law Reform (Marriage and Divorce) Act 1976.

I have no doubt that the 1935 Ordinance did not intend to depart from the English position as regards the rights of the father of an illegitimate H child. In fact, there is an indication in the Ordinance that such was the case. I quote, leaving aside the provisos, ss 5 and 6 of the Ordinance:

> 5 The father of an infant shall ordinarily be the guardian of the infant's person and property.
>
> 6 Where an infant has no lawful father living, the mother of the infant I shall ordinarily be the guardian of his person and property.

Section 6 was the counterpart of s 5. Since s 6 expressly spoke of a lawful father, s 5 must have been thinking of a lawful father as well, so that the father that was given the charge of guardianship by s 5 was the lawful father.

When Parliament enacted the 1961 Act on the model of the 1935 Ordinance, it made two changes that are relevant to the question now under consideration.

One of the changes was the omission of the word 'lawful' from s 6. I reproduce ss 5 and 6 of the 1961 Act as originally enacted, omitting the provisos:

> 5 Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property.
>
> 6 Subject to the provisions of section 10, where an infant has no father living, the mother of the infant shall be the guardian of his person and property.

The other change was the insertion, in s 1, of sub-s (2), which in the revised Act has become sub-s (3). The relevant part is para (a). I quote sub-s (2)(a):

> (2) Nothing in this Act shall apply in any State to persons professing the Muslim religion until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that —
>
> (a) nothing in this Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion.

It is because of that provision, with its reference to illegitimate children, that Mohd Hishamudin J in *Low Pek Nai v Koh Chye Guan* [1995] 1 MLJ 238 differed with *Re Balasingam* and ruled that the 1961 Act applies also to illegitimate children. The effect of that decision would be that s 5 applies to illegitimate children, with the result that the father of an illegitimate child would be the guardian of the child, just as in the case of the father of a legitimate child.

Subsection (2)(a) clarifies that the 1961 Act is not directly applicable to Muslims but a State Legislature may adopt it for application to Muslims and, in adopting it, the State Legislature may provide for the non-application to certain persons under 18 of any provision that is contrary to Islam or Malay custom. Such a person is a person who professes the religion of Islam and one whose parents profess the religion of Islam. In the case of a legitimate child, the parent is the father. In the case of an illegitimate child, the parent is the mother. The difference reflects the Islamic law position that, in the case of an illegitimate child, it is the mother and not the father that is the recognized parent.

The fact that the provision includes mention of illegitimate children under 18 as persons to whom the State Legislature may provide that anything in the Act that is contrary to Islam or Malay custom shall not apply only means that the drafters of the provision (and therefore Parliament) either thought that the 1935 Ordinance — which was being re-enacted — or certain of its provisions applied to illegitimate children or

A feared that they might be construed to so apply. It does not establish that they do so apply.

In my respectful opinion, sub-s (2)(a) does not prove that Parliament intended to change the law from what it had been under the 1935 Ordinance. Certainly it does not prove that Parliament intended that under s 5 of the B 1961 Act the father of an illegitimate child should be the guardian of the child. For that, express words are necessary.

Neither ought the omission of the word 'lawful' from s 6 to be construed as denoting that Parliament intended to effect a change in the law from what it had been under the 1935 Ordinance. As I said, the happy C circumstance of the presence of the word 'lawful' in s 6 of the Ordinance is an indication that s 5 also intended to refer to the father of a legitimate child. The omission of the word 'lawful' from s 6 in the 1961 Act ought not to be construed as denoting a change of intention. It is not safe to so construe. For such a radical change in the law, there must be express words to give effect to it.

D I am therefore of the view that s 5 of the 1961 Act is intended to apply to a lawful father and that accordingly the father of an illegitimate child cannot claim guardianship under it.

The wider question whether the Act as a whole applies only to legitimate children and does not apply to illegitimate children is of concern E to me in this application only because of the position of the mother. That is because if the entire Act does not apply to illegitimate children — as was decided in *Re Balasingam* — then s 6 is concerned only with legitimate children and the position of the mother in this case is not provided for in s 6 and, further, if *Re Balasingam* were to be followed by analogy, the court would have no jurisdiction to entertain her application as an application F under the 1961 Act which, on its face, it is. I do not, however, need to come to a determination of my own whether — as decided in *Re Balasingam* — the 1961 Act does not apply to illegitimate children, although it does appear to me, after studying *Re Balasingam* and the English case of *Re CT (an infant)* [1957] Ch 48, which greatly influenced *Re Balasingam*, that it G would be no easy matter to maintain that s 6 or any other section of the 1961 Act does apply to illegitimate children. If s 6 does not apply to illegitimate children, so that the mother in this case cannot rely on it to claim guardianship of the child, then the question must be decided according to the common law of England, under which the mother, to the exclusion of the father, has rights over and obligations towards her illegitimate child. H For that reason, I would order that the mother be the guardian of the child.

That the mother of an illegitimate child has rights over the child to the exclusion of the father is reflected in s 11 of the Legitimacy Act 1961 — originally enacted as Act No 11 of 1961 and now revised as Act 60 — which section contains provision for an illegitimate child to take an interest I in the property of his mother on her death intestate, but does not make a corresponding provision in respect of the father, and provision for the mother to take an interest in the property of the child on his death intestate, but no provision for the father. Section 11 provides as follows:

(1) Where, on or after the prescribed date, the mother of an illegitimate child, the child not being a legitimated person, dies intestate as respects all or any of her property, and does not leave any legitimate issue surviving her, the illegitimate child, or if he is dead his issue, shall be entitled to take any interest therein to which he or his issue would have been entitled if he had been born legitimate. A

(2) Where, on or after the prescribed date, an illegitimate child, not being a legitimated person, dies intestate as respects all or any of his property, his mother, if surviving, shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent. B

That provision is a re-enactment of s 10 of the Legitimacy Ordinance of the Straits Settlements (SS Cap 85), which had been in force since 18 May 1934, and the identical s 10 of the Legitimacy Ordinance of the Federated Malay States (FMS Cap 69), which had been in force since 1 January 1933. C

The whole of the Legitimacy Act 1961 is in fact a re-enactment of those two statutes. Both the Guardianship of Infants Act 1961 and the Legitimacy Act 1961 received the Royal Assent on the same day, 9 March 1961 and came into force on the same day, 23 March 1961. In view of the fact that at the time when the two Acts were enacted Parliament had in mind the need to provide expressly in s 11 of the Legitimacy Act 1961 for succession to property in the event of the death intestate of an illegitimate child and that of the mother of an illegitimate child respectively, how apt it would have been had, instead merely of the word 'lawful' being omitted from it, something been done to s 6 of the Guardianship of Infants Act 1961 to make it clear that it applies also in the case of the mother of an illegitimate infant. D E

In fact I have wondered whether, with the word 'lawful' in place, s 6 of the 1935 Ordinance could be construed as having been intended to apply to the mother of an illegitimate infant as well as the mother of a legitimate infant, using the following line of argument. F

The case of s 6 was not presented as a case 'where the lawful father of an infant is dead'. If the case had been presented in that manner, the enactment that the mother of the infant shall be his guardian could only have been intended to apply to a lawful infant, with the result that s 6 did not provide for the guardianship of an illegitimate child whose father is dead. The case of an infant whose lawful father is dead could only be the case of a legitimate infant. G

But the case of s 6 was presented as a case 'where an infant has no lawful father living'. Presented in that manner, the case became wider for if it had been asked, 'What kind of infant has no lawful father living?', the answer could be one of two kinds. An infant whose lawful father has died is obviously an infant who has no lawful father living. But an infant whose father is an unlawful father, whether he be dead or alive, is also an infant who has no lawful father living. Therefore, the case of s 6 could have been the case of a child of a lawful father who is dead as well as the case of a child whose father is an unlawful father, and so by virtue of s 6, the mother would be the guardian of an illegitimate infant, whether the father is dead or alive. H I

That, however, might be seen as a line of argument to suit a wish. Anyhow, as I said, if s 6 of the 1961 Act does not apply to the case of the mother of an illegitimate child, the mother in this case could claim guardianship by virtue of the common law.

There is, however, another question of jurisdiction. In *Re Balasingam*, it was decided that the High Court has no jurisdiction to entertain custody proceedings which cannot be brought under the 1961 Act. The decision would apply equally to guardianship proceedings. It would follow from that decision that if the mother's application in this case cannot be brought under the Act, the High Court has no jurisdiction to entertain it. I would respectfully differ with that decision. Section 24(d) of the Courts of Judicature Act 1964 gives the High Court 'jurisdiction to appoint and control guardians of infants and generally over the person and property of infants'. It does not seem to me right that the jurisdiction should be restricted to cases that can fall within the 1961 Act. In any event, the question of jurisdiction has not been raised or argued in this case and I have already made an order granting custody of the child to the mother, which order was applied for and granted by virtue of the proviso to s 5. No objection to jurisdiction having been raised, I shall act on the assumption that I have the jurisdiction, which was what — according to *Re Balasingam* at p 75G–H — happened in *Re Miskin Rowter* [1963] MLJ 341.

I therefore appoint the mother to be the guardian of the child.

I order costs for the mother.

Application allowed.

Reported by S Sankey